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No. 86-6867

In the

Supreme Court of the United States

October Term, 1986

Leslie Lowenfield ..... *Petitioner*

v.

C. Paul Phelps,
Secretary of the Department of
Corrections, State of
Louisiana, *et al.* ..... *Respondents*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE *AMICUS CURIAE* THE STATE OF ARKANSAS IN SUPPORT OF C. PAUL PHELPS, SECRETARY OF THE DEPARTMENT OF CORRECTIONS STATE OF LOUISIANA, *ET AL.*

J. STEVEN CLARK
Attorney General of Arkansas

CLINT MILLER
Assistant Attorney General
Heritage West Building
201 East Markham
Little Rock, AR 72201
(501) 371-3657

Attorneys of Record
for AMICUS CURIAE
The State of Arkansas

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STATEMENT OF THE INTERST OF THE *AMICUS CURIAE* THE STATE OF ARKANSAS

Amicus curiae the State of Arkansas supports the position of the Respondents C. Paul Phelps Secretary of the Department of Corrections State of Louisiana, *et. al.*, with respect to the Eighth Amendment issue presented in the instant case. In this case, petitioner Lowenfield is asking this Honorable Court to resolve a conflict in the interpretation of the Eighth Amendment that exists between the United States Fifth Circuit Court of Appeals and the United States Eighth Circuit Court of Appeals. In essence, the Eighth Circuit Court of Appeals has held that

the Eighth Amendment requires that a state's capital sentencing procedure genuinely narrow the class of murderers eligible for the death penalty when the state defines capital murder and also genuinely narrow this class again at the penalty stage of a capital trial. The Fifth Circuit Court of Appeals has rejected the Eighth Circuit's interpretation of the Eighth Amendment and has held that the Eighth Amendment requires that a state's capital sentencing procedure genuinely narrow the class of murderers eligible for the death penalty only once.

Amicus curiae the State of Arkansas is within the jurisdiction of the Eighth Circuit Court of Appeals. Pursuant to its holding in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.) *cert. denied*, ____ U.S. ____, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985), the Eighth Circuit Court of Appeals, in appeals from habeas corpus petitions brought pursuant to 28 U.S.C. §2254, has vacated four death sentences imposed by Arkansas juries and approved by the Arkansas Supreme Court. There are twenty-nine inmates on death row in Arkansas. Of these, twenty have sentences that could be vacated if the *Collins* holding were applied to their sentences. *Amicus curiae* the State of Arkansas' interest in the instant case is its desire to stop the Eighth Circuit Court of Appeals from clearing out Arkansas' death row pursuant to that court's erroneous interpretation of the Eighth Amendment in *Collins, supra*. *Amicus curiae* the State of Arkansas respectfully requests that this Honorable Court declare that the Eighth Circuit Court of Appeals' *Collins* decision incorrectly interprets the Eighth Amendment and respectfully requests that this Honorable Court affirm the United States Fifth Circuit Court of Appeals Eighth Amendment holding in the case *sub judice*, *Lowenfield v. Phelps*, 817 F.2d 285 (1987).

SUMMARY OF ARGUMENT

The two Louisiana statutes at issue, La. Rev. Stat. 14:30 (A) (3) (1986) and La. C.Cr.P. art. 905.4(d) (1984), are not identical. Section 30(A) (3) is part of the definition of capital murder and sets forth a particular *mens rea*—that of entertaining a specific intent to kill or inflict great bodily harm upon more than one person. Art. 905.4(d) is an aggravating circumstance in Louisiana's capital sentencing procedure. A Louisiana jury may find art. 905.4(d) when the defendant engaged in a particular *actus reus*—that of *actually creating* a risk of death or great bodily harm to more than one person. At a minimum, § 30(A) and art. 905.4(d) both meet the standard for valid aggravating circumstances set forth in *Zant v. Stephens*, 462 U.S. 862, 877 (1983). As between the two statutes, art. 905.4(d) genuinely narrows the class of murderers eligible for the death penalty slightly more than § 30(A) (3) does.

Conceivably, a defendant in Louisiana could entertain the culpable mental state set forth in § 30(A) (3) while murdering his victim, but subsequently fail to actually create a risk of death or great bodily harm to others. For example, after murdering his victim, a first degree murderer in Louisiana could simply relent and abandon his specific intention to kill others. Because § 30(A) (3) proscribes a particular *mens rea*—specific intent—and because art. 905.4(d) punishes the defendant's conduct, not his thoughts, they are not identical. Because conduct usually, but not inevitably, follows a specific intent, art. 905.4(d) further narrows down the class of first degree murderers in Louisiana who kill with the specific intent set forth in §30(A) (3). Moreover, actually creating a risk of death or great bodily harm to others, as opposed to merely planning to do so, justifies the imposition of the death penalty on Louisiana first degree murderers who actually create such a risk. *See Stephens, supra* at 877.

Assuming *arguendo* that § 30(A) (3) and art. 905.4(d) are identical, their congruence does not violate the Eighth Amendment. The Eighth Amendment permits states to place aggravating circumstances in their definitions of capital murder in order to genuinely narrow the class of murderers eligible for the death penalty. *Jurek v. Texas*, 428 U.S. 262, 270-71 (1976). If a state genuinely narrows the class of murderers eligible for the death penalty at the definitional stage of capital murder, then the state need not further narrow this class of murderers at the penalty stage of a capital trial. *Zant v. Stephens*, 462 U.S. 862, 876-77 (1983); *see generally*, Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 Duquesne Law Review 317, 360-69 (1984).

ARGUMENT

PETITIONER'S DEATH SENTENCE, BASED ON A SOLE STATUTORY "AGGRAVATING" CIRCUMSTANCE THAT MERELY REPEATS AN ELEMENT OF THE CRIME, DOES NOT VIOLATE THE EIGHTH AMENDMENT REQUIREMENT THAT SENTENCER DISCRETION BE DIRECTED AND LIMITED SO AS TO MINIMIZE THE RISK OF ARBITRARY AND CAPRICIOUS EXECUTIONS.

A. *Louisiana Revised Statute 14:30(A) (3) and Louisiana Code of Criminal Procedure art. 905.4(d) are not identical.*

Petitioner Lowenfield's Eighth Amendment argument emanates from a single alleged flaw in Louisiana's statutory capital sentencing procedure: the "complete overlap" of La.Rev.Stat. 14:30(A) (3) (1986) and La.C.Cr.P. art. 905.4(d) (1984). In pertinent part § 30(A) (3) states, "[f]irst degree murder is killing of a human being . . . [w]hen the offender has a specific intent to kill or to inflict great bodily harm upon more than one person . . . ." In pertinent part art. 905.4(d) states, "[t]he following shall be considered aggravating circumstances . . . the offender knowingly created a risk of death or great bodily harm to more than one person . . . ." Section 30(A) (3) is an element of the crime of first degree murder, a capital offense in Louisiana. Art. 905.4(d) is an aggravting circumstance that the jury may consider in the penalty stage of a capital trial in Louisiana. The alleged congruence of these two statutes is the first principle from which Lowenfield's Eighth Amendment analysis proceeds. According to Lowenfield, because art. 905.4(d) exactly duplicates § 30(A) (3), art. 905.4(d) does not meet the Eighth Amendment standard for valid aggravating circumstances set forth in *Zant v. Stephens*, 462 U.S. 862 (1982) because it does not " . . . genuinely narrow the class of persons eligible for the death penalty . . . ." *Id.* at 877. According to Lowenfield, because art. 905.4(d)

does not meet the *Stephens* standard, his death sentence was imposed in violation of the Eighth Amendment and is, therefore, invalid. Lowenfield's analysis of this issue is derived entirely from the United States Eighth Circuit Court of Appeal's decision in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985). Lowenfield's argument on this score is meritless because his first principle is incorrect; in point of fact, § 30(A)(3) and art. 905.4(d) are not identical.

Section 30(A)(3) and art. 905.4(d) fall on either side of the most fundamental dividing line in the taxonomy of substantive criminal law – that line between the concepts of *mens rea* and *actus reus*. [1] Section 30(A)(3) sets forth one of several culpable mental states that a defendant must have when he kills a human being in order to be guilty of first degree murder in Louisiana. Art. 905.4(d), on the other hand, describes a certain kind of conduct, apart from the killing of one human being while entertaining a certain culpable mental state, that the defendant must engage in, in order to be eligible for the death penalty in Louisiana. The Louisiana Supreme Court has consistently held that in order for art. 905.4(d) to apply, the defendant must, *actually* cause the risk of death or great bodily harm to someone other than his initial victim. *State v. Williams*, 480 So.2d 721, 726 (La. 1985); *State v. Welcome*, 458 So.2d 1235, 1245 (La. 1983); and *State v. Sonnier*, 402 So.2d 650, 658 (La. 1981), *cert. denied*, 463 U.S. 1229 (1983); *cf. State v. Moore*, 414 So.2d 340, 348 (La. 1982) (art. 905.4(d) improperly found by the jury because the defendant did not actually create risk of death or great bodily harm to a four-month-old infant by stabbing the infant's mother in the mother's home and then leaving the scene as the mother lay dying; no risk of death or great bodily harm to the infant because she was

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Mens rea is the mental state which is required to animate most kinds of conduct proscribed by criminal laws and *actus reus* is the proscribed conduct itself. J. Hall, *General Principles of Criminal Law* 70-1, 222-24 (2d. ed. 1960).

not harmed or threatened). It is possible for a defendant to murder one person while entertaining the specific intention to murder a second person and yet never actually create a risk of death or great bodily harm to the second person – for example the defendant could simply relent after his initial murder and not make any further effort to kill or the defendant's intended second victim might not be within striking distance. [2] In *State v. Andrews*, 452 So.2d 687 (La. 1984), Justice Lemmon of the Louisiana Supreme Court, dissenting from the majority's holding that the State had failed to prove the specific intent required by § 30(A)(3), noted that:

> The present case raises for the first time an issue concerning the difference in terminology between La.R.S. 14:30(3), which defines one of the aggravating factors required as an essential element of the crime of first degree murder, and La.C.Cr.P. art. 905.4(d), which defines one of the statutory aggravating circumstances required for a recommendation of the death penalty in the sentencing phase of a bifurcated capital trial. When a defendant acts with a specific intent to kill more than one person, but does not actually and "knowingly create a risk of death or great bodily harm to more than one

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Such a set of facts occurred in the case of *Willie v. State*, 360 So.2d 813, 816 (La. 1978). In *Willie*, the instant issue was not discussed because the Louisiana Supreme Court vacated appellant Willie's death sentence on the authority of *Roberts v. Louisiana*, 428 U.S. 325 (1976). According to the Louisiana Supreme Court in *Willie*, appellant Willie was guilty of first degree murder because he had killed one person while entertaining the specific intention to kill or inflict great bodily harm upon more than one person. *Id.* at 816. The Louisiana Supreme Court concluded that Willie had intended to break into his neighbor's parents' house and kill the neighbor and her parents. The Louisiana Supreme Court reached this conclusion despite the fact that the parents were not at home when Willie broke into their home and killed their daughter. Because the parents were not at home when Willie murdered their daughter, Willie could not possibly have harmed or threatened them *at that time*. *Cf. Moore*, *supra*. Because Willie could not have harmed or threatened the parents of his victim while he was murdering his victim, he could not have *actually* created a risk of harm to the parents of his victim and, therefore, a jury would have had no factual basis to find that Willie fell within the reach of art. 905.4(d).

> person", he is guilty of first degree murder, but arguably *may* not be "death qualified" because of the insufficiency of proof of a statutory aggravating circumstance. The present case, however, does not present this problem, because the jury did not recommend the death penalty. *Id.* at 690 n.2.

In summary, it is simply not true, as Lowenfield contends, that criminal defendants always follow through on their specific intents and actually do that which they had merely contemplated.

It is true that Lowenfield did act on his specific intent and did actually create a risk of death or great bodily harm to someone other than his initial victim. It was Lowenfield's choice to do so. That Lowenfield chose to do so *does* differentiate him from defendants guilty of first degree murder pursuant to § 30(A)(3) who do not actually create a risk of death or great bodily harm to others. Furthermore, Lowenfield's actual creation of this risk does reasonably justify the imposition of death on him compared to the first degree murderers who do not create such a risk.

In light of the *amicus'* analysis presented above, Lowenfield's actual complaint is not that the absolute congruence between § 30(A)(3) and art. 905.4(d) prevents them from genuinely narrowing the field of first degree murderers in Louisiana, but that art. 905.4(d) fails to genuinely narrow a subclass of first degree murderers already separated out of the class of all murderers by the winnowing action of § 30(A)(3). As *amicus curiae* the State of Arkansas will demonstrate in the next subsection of its argument, the Eighth Amendment does not require a state to erect a "double-filter" arrangement of aggravating circumstances that separates the class of murderers eligible for the death penalty from the larger class of those who are not and then within the class of death-eligible murderers, genuinely narrows this class (or a subclass of this class) again down to those who *truly* deserve to die.

B. *The Eighth Amendment does not require the states to arrange aggravating circumstances within a capital sentencing procedure such that the class of murderers eligible for the death penalty is genuinely narrowed twice—once at the guilt stage and again at the penalty stage of a capital trial.*

Boiled down to its essence, Lowenfield's argument amounts to a claim that the Eighth Amendment commands that a state structure its capital sentencing procedure in such a way so as to genuinely narrow the class of murderers eligible for the death penalty two times. According to Lowenfield, one such genuine narrowing must occur in a capital trial at the definitional level of the state's capital murder statute and, according to Lowenfield, a second genuine narrowing must occur at the penalty stage of the capital trial.[3] Lowenfield's argument on this point is, essentially, a recitation of analysis first set forth by the United States Eighth Circuit Court of Appeals in *Collins v.*

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It is beyond question that art. 905.4(d) is, of itself, a valid aggravating circumstance no matter where it is placed in a state's capital sentencing procedure—it is valid because it genuinely narrows the class of defendants eligible for the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 193 n.44 (1976) and *Profitt v. Florida*, 428 U.S. 242, 248 n.6 (1976) (both approving an aggravating circumstance virtually identical to art. 905.4(d)).

Lockhart, 754 F.2d 258 (8th Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985). [4]

The Eighth Amendment analysis set forth by the Eighth Circuit Court of Appeals in *Collins* involved an interpretation of murder committed in the course of an aggravated robbery (robbery-murder was (and is) capital murder in Arkansas—*see* Ark. Stat. Ann. § 41-4702(A) (Supp. 1973)) and the aggravating circumstance of "capital murder committed for pecuniary gain," as set forth in Ark. Stat. Ann. § 41-1303(6) (Repl. 1977). In *Collins* the Eighth Circuit set forth a universal truth that every robber-murderer kills in order to realize a pecuniary gain. *Id.* at 264. From this first principle the Eighth Circuit concluded that a jury would automatically find pecuniary gain as an aggravating circumstance in every robbery-murder case and that, therefore, pecuniary gain " . . . cannot be a factor that distinguishes some robber-murderers from others." *Id.*

4

Collins, supra has been followed as binding authority in *Woodard v. Sargent*, 806 F.2d 153 (8th Cir. 1986); *Ruiz and Denton v. Lockhart*, 806 F.2d 158 (8th Cir. 1986) and *Singleton v. Lockhart*, 653 F.Supp. 1114, 1134-37 (E.D. Ark. 1986). Justices Brennan and Marshall have stated that they agree with the Eighth Amendment analysis set forth by the Eighth Circuit in *Collins*. *Wiley v. Mississippi*, ____ U.S. ____, 107 S.Ct. 304, 93 L.Ed.2d 278 (1986) (dissent from denial of certiorari); *see also Williams v. Ohio*, ____ U.S. ____, 107 S.Ct. 1385, 94 L.Ed.2d 699 (1987) (Brennan, White and Marshall, JJ., dissenting from denial of certiorari); *see also McClellan v. Commonwealth*, 715 S.W.2d 464, 474 (Ky. 1986) (*Collins*' Eighth Amendment analysis cited with approval by Leibson, J., in concurring opinion). The United States Fifth Circuit Court of Appeals has rejected the *Collins* Eighth Amendment analysis in the following cases: *Lowenfield v. Phelps*, 817 F.2d 285 (1987); *Wilson v. Butler*, 813 F.2d 664, 673 (1987); *Evans v. Thigpen*, 809 F.2d 239 (1987); *Welcome v. Blackburn*, 793 F.2d 672, 677 (1986); *Glass v. Blackburn*, 791 F.2d 1165, 1174 (1986) and *Wingo v. Blackburn*, 783 F.2d 1046, 1051 (1986). The North Carolina Supreme Court has rejected the Eighth Circuit's Eighth Amendment analysis in *State v. Quesinberry*, 319 N.C. 228, 237, 354 S.E.2d 446, 452 (1987) and *State v. Williams*, 317 N.C. 474, 483-86, 346 S.E.2d 405, 411-13 (1986); *see also Pickens v. State*, 292 Ark. 362, 372-73, 730 S.W.2d 230, 236-37 (1987) (Hickman, J., concurring).

at 264. According to the Eighth Circuit, such a state of affairs violates the Eighth Amendment because " . . . [a]n aggravating circumstance is an objective criterion that can be used to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the *same* underlying capital crime" (emphasis added). *Id.* at 264. In essence, the Eighth Circuit holds in *Collins* that the pecuniary gain aggravating circumstance must further narrow a subclass of capital murderers, robber-murderers, that had already been winnowed out of the class of all premeditated murderers and all felony murderers by Arkansas' designation of robbery-murder as capital murder. This analysis by the Eighth Circuit of the Eighth Amendment's requirement in capital sentencing is completely wrong. The Eighth Circuit's interpretation of the Eighth Amendment is wrong because it ignores this Court's plurality interpretation of the Eighth Amendment in *Jurek v. Texas*, 428 U.S. 262 (1976) and this Court's affirmation of *Jurek* in *Zant v. Stephens*, 462 U.S. 862 (1983). [5]

In *Jurek* a plurality of this Court approved Texas' capital sentencing procedure. In Texas, aggravating circumstances are embedded into the definition of capital murder. Louisiana's definition of capital murder is the same as Texas' in this respect. In approving Texas' decision to fix aggravating circumstances into its definition of capital murder, the plurality noted:

> While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . .

5
Jurek is not cited in the Eighth Circuit's *Collins* decision.

> So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option—even potentially—for a smaller class of murders in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime. *Id.* at 270-71.

Seven years after *Jurek* was decided, a majority of this Court decided *Zant v. Stephens, supra.* In *Stephens* this Court cited with approval the *Jurek* plurality's approbation of Texas' capital sentencing procedure in reaching one of *Stephens'* holding: the Eighth Amendment does not require a jury to balance aggravating circumstances against mitigating circumstances at the sentencing stage of a capital trial. *Stephens* at 875-76 n.13, 890. After *Stephens*, there is simply no doubt that the Eighth Amendment permits states to genuinely narrow the class of persons eligible for the death penalty by placing aggravating circumstances within the definition of capital murder. Furthermore, there is no doubt that the Eighth Amendment does not require that aggravating circumstances be considered at the penalty stage of a capital case nor that they be explicitly balanced against mitigating circumstances. Pursuant to *Stephens*, Louisiana could, consist with the Eighth Amendment, genuinely narrow the class of murderers eligible for the death penalty by fixing aggravating circumstances into its definition of capital murder and could forego any further narrowing, by the use

of additional aggravating circumstances, of this class of murderers at the sentencing phases of their capital trials. [6]

In summary, the Eighth Amendment requires that the aggravating circumstances in a state's death penalty sentencing procedure genuinely narrow the class of persons eligible for the death penalty only once. Moreover, the Eighth Amendment permits this narrowing to occur at the initial stage of the capital sentencing process when the state defines capital murder or later, at the sentencing stage of the state's capital trials. Given this Court's holding in *Stephens*, Lowenfield's contention that aggravating circumstances must genuinely narrow the class of persons eligible for the death penalty and must, quite apart from this narrowing function, also focus or guide the jury's deliberation during the penalty stage of a capital trial is incorrect. The Eighth Amendment does not require aggravating circumstances to have a "narrowing" function separate from a "guiding" or "focusing" function—the aggravating circumstances' "narrowing" function, of itself, channels the jury's discretion in the sentencing phase of a capital trial. *Stephens, supra* at 876 n. 14. *See also Welcome v. Blackburn*, 793 F.2d 672, 677 (5th Cir. 1986) and *State v. Williams*, 317 N.C. 474, 483-86, 346 S.E.2d 405, 411-13 (1986); *see generally* Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 Duquesne Law Review 317, 360-69 (1984).

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At page 43 of his brief, Lowenfield cites *Skipper v. South Carolina*, 106 S.Ct. 1669, 1671 (1986); *Estelle v. Smith*, 451 U.S. 454, 472-73 (1981) and *Adams v. Texas*, 448 U.S. 38, 46 (1980) in an effort to persuade this Court that it has cited *Jurek* for the proposition that the Eighth Amendment requires the jury in the sentencing phase of a capital case to focus on aggravating circumstances and to balance them against mitigating circumstances. *Estelle v. Smith* and *Adams* were decided prior to *Zant v. Stephens*. In any event, none of these cases deals with the specific issue presented in the instant case. Moreover, the passages Lowenfield cites are mere dicta insofar as they were mentioned by this Court in resolving the issues posed in these cases.

CONCLUSION

Amicus curiae the State of Arkansas respectfully requests that this Honorable Court affirm the Eighth Amendment analysis set forth by the United States Fifth Circuit of Appeals in the case of *Lowenfield v. Phelps*, 817 F.2d 285 (1987) and that this Honorable Court hold that the Eighth Amendment analysis set forth by the United States Eighth Circuit Court of Appeals in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985) is incorrect.

Respectfully submitted,

J. STEVEN CLARK
Attorney General of Arkansas

CLINT MILLER
Assistant Attorney General
Heritage West Building
201 East Markham
Little Rock, AR 72201
(501) 371-3657

Attorneys of Record
for AMICUS CURIAE
The State of Arkansas